SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 650

JOHN NICHOLAS, TRUSTEE OF THE ESTATE OF BEACHCOMBER MOTEL, INC., BANKRUPT, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. 1]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF FLORIDA

DEBTOR'S PETITION IN PROCEEDINGS FOR AN ARRANGEMENT UNDER CHAPTER XI—Filed August 6, 1958

In the United States District Court for the Southern District of Florida, Miami Division. In the matter of The Beachcomber Motel, Inc., a Florida corporation, Debtor. No. 3988-M.

To the Honorable Emett C. Choate and Joseph P. Lieb, Judges of the United States District Court for the Southern District of Florida, Miami Division.

The Petition of The Beachcomber Motel, Inc., a Florida corporation, of 18925 Collins Avenue, Miami Beach, in the County of Dade, State of Florida, by occupation a .... [*or* engaged in the business of motel operator] Respectfully Represents:

1. Your petitioner has had his principal place of business [*or* has resided, *or* has had his domicile] at ...., within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. No bankruptcy proceeding, initiated by a petition by or against your petitioner, is now pending.

3. Your petitioner is insolvent [*or* unable to pay his debts as they mature], and proposes the following arrangement with his *unsecured* creditors: 20% in full; 5% upon confirmation, 5% on January 2, 1959, 5% on February 2, 1959 and 5% on March 2, 1959.

4. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors,

and such further statements concerning said debts as are required by the provisions of the Act of Congress relating to bankruptcy.

5. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal, and such further statements concerning said property as are required by the provisions of said Act.

6. The statement hereto annexed, marked Exhibit 1, and verified by your petitioner's oath, contains a full and true statement of all his executory contracts, as required by the provisions of said Act.

7. The statement hereto annexed, marked Exhibit 2, and verified by your petitioner's oath, contains a full and true statement of his affairs, as required by the provisions of said Act.

Wherefore your Petitioner Prays that proceedings may be had upon this petition in accordance with the provisions of chapter XI of the Act of Congress relating to bankruptcy.

The Beachcomber Motel, Inc., a Florida corporation,
By Shirley Woolf, Secretary, Petitioner.

Feibelman & Friedman, Attorneys for Petitioner, 448 Seybold Building, Miami, Fla.

United States of America,
State of Florida,
County of Dade, ss.

I, Shirley Woolf, Secretary of The Beachcomber Motel, Inc., a Florida corporation, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief.

Shirley Woolf, Petitioner.

Subscribed and sworn to before me this 6th day of August, 1958.

David G. E. Morrison, Notary Public. Notary Public, State of Florida at Large. My Commission expires March 10, 1959. Bonded by American Surety Co. of N. Y.

[File endorsement omitted]

Oaths required by this act, except upon hearings before a judge, may be administered by referees and by officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and diplomatic or consular officers of the United States in any foreign country.

All petitions and schedules shall be printed or written out plainly, without abbreviation or interlineation, except where such abbreviation and interlineation may be for the purposes of reference. (Rule 5 Paragraph 1).

The court may allow amendments to the petition and schedules on application of the petitioner. Amendments shall be printed or written, signed and verified, like original petitions and schedules, and filed in triplicate. If amendments are made to separate schedules, the same must be made separately, with proper references. In the application for leave to amend, the petitioner shall state the cause of the error in the paper originally filed. (Rule 11.)

[fol. 2]

SCHEDULE A—STATEMENT OF ALL DEBTS OF BANKRUPTCY

(See opposite) ☞

Schedule A—STATEMENT OF ALL DEBTS OF BANKRUPT.

Schedule A-1. Statement of all creditors to Whom Priority is Secured by the Act.

Claims which have priority.	Reference to ledger or voucher	Names of creditors.	Residences (if unknown, that fact must be stated).	When and where incurred or contracted.	Whether claim is contingent, unliquidated or disputed.	Nature and consideration of the debt, and whether incurred or contracted as partner or joint contractor and, if so, with whom.	Amount due or claimed. $	Cts.
a								
Wages due workmen, servants, clerks, or travelling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt, to an amount not exceeding $600 each, earned within three months before filing the petition.	None.							
b								
Taxes due and owing to—								
(1) The United States:		Director of Internal Revenue, Jacksonville, Florida - F.U.T.A. and S.S. Tax					9,684	09
(2) The State of								
(3) The county, district or municipality of State of		Ray E. Green, Comptroller, Tallahassee, Florida					1,766	77
c								
(1) Debts owing to any person, including the United States who by the laws of the United States is entitled to priority.								
(2) Rent owing to a landlord who is entitled to priority by the laws of the State of , accrued within three months before filing the petition, for actual use and occupancy.		Raymond Wennick, as Trustee, c/o Daniel Sepler Citizens Federal Savings Hialeah, Florida Under lease of June 18, 1957					15,000	00

b Taxes due and owing to—		
(1) The United States:	Director of Internal Revenue, Jacksonville, Florida - F.U.T.A. and S.S. Tax	9,684.09
(2) The State of	Ray E. Green, Comptroller, Tallahassee, Florida	1,766.77
(3) The county, district or municipality of State of		
c (1) Debts owing to any person, including the United States who by the laws of the United States is entitled to priority.		
(2) Rent owing to a landlord who is entitled to priority by the laws of the State of , accrued within three months before filing the petition, for actual use and occupancy.	Raymond Wennick, as Trustee, c/o Daniel Sepler Citizens Federal Savings Hialeah, Florida Under lease of June 18, 1957	15,000.00
	Total	26,450.86

THE BEACHCOMBER MOTEL, INC.

By _____

SHIRLEY WOOLF, Secretary Petitioner.

Schedule A-1. Statement of all creditors to whom priority is secured.

SUMMARY OF DEBTS AND ASSETS.

[From the statements of the debtor in Schedules A and B.]

Schedule A—	1-a	Wages			
Schedule A—	1-b (1)	Taxes due United States	9,684	.09	
Schedule A—	1-b (2)	Taxes due States	1,766	.77	
Schedule A—	1-b (3)	Taxes due counties, districts and municipalities			
Schedule A—	1-c (1)	Debts due any person, including the United States, having priority by laws of the United States			
Schedule A—	1-c (2)	Rent having priority	15,000	.00	
Schedule A—	2	Secured claims	25,000	.00	
Schedule A—	3	Unsecured claims	81,949	.16	
Schedule A—	4	Notes and bills which ought to be paid by other parties thereto			
Schedule A—	5	Accommodation paper			
		Schedule A, Total	133,400	.02	
Schedule B—	1	Real Estate			
Schedule B—	2-a	Cash on hand	500	.00	
Schedule B—	2-b	Negotiable and non-negotiable instruments and securities			
Schedule B—	2-c	Stock in trade	981	.00	
Schedule B—	2-d	Household goods			
Schedule B—	2-e	Books, prints, and pictures			
Schedule B—	2-f	Horses, cows, and other animals			
Schedule B—	2-g	Automobiles and other vehicles			
Schedule B—	2-h	Farming stock and implements			
Schedule B—	2-i	Shipping and shares in vessels			
Schedule B—	2-j	Machinery, fixtures, and tools	28,000	.00	
Schedule B—	2-k	Patents, copyrights, and trade-marks			
Schedule B—	2-l	Other personal property	10,914	.60	
Schedule B—	3-a	Debts due on open accounts	7,100	.00	
Schedule B—	3-b	Policies of insurance			
Schedule B—	3-c	Unliquidated claims			
Schedule B—	3-d	Deposits of money in banks and elsewhere	1,940	.00	

Schedule A—	1-c (2)	Rent having priority		15,000.00	
Schedule A—	2	Secured claims		25,000.00	
Schedule A—	3	Unsecured claims		81,949.16	
Schedule A—	4	Notes and bills which ought to be paid by other parties thereto			
Schedule A—	5	Accommodation paper			
		Schedule A, Total		133,400.02	
Schedule B—	1	Real Estate			
Schedule B—	2-a	Cash on hand		500.00	
Schedule B—	2-b	Negotiable and non-negotiable instruments and securities			
Schedule B—	2-c	Stock in trade		981.00	
Schedule B—	2-d	Household goods			
Schedule B—	2-e	Books, prints, and pictures			
Schedule B—	2-f	Horses, cows, and other animals			
Schedule B—	2-g	Automobiles and other vehicles			
Schedule B—	2-h	Farming stock and implements			
Schedule B—	2-i	Shipping and shares in vessels			
Schedule B—	2-j	Machinery, fixtures, and tools		28,000.00	
Schedule B—	2-k	Patents, copyrights, and trade-marks			
Schedule B—	2-l	Other personal property		10,914.60	
Schedule B—	3-a	Debts due on open accounts		7,100.00	
Schedule B—	3-b	Policies of insurance			
Schedule B—	3-c	Unliquidated claims			
Schedule B—	3-d	Deposits of money in banks and elsewhere		1,940.00	
Schedule B—	4	Property in reversion, remainder, expectancy or trust			
Schedule B—	5	Property claimed as exempt	$		
Schedule B—	6	Books, deeds and papers			
		Schedule B, Total		49,435.60	

Summary of Debts and Assets.

THE BEACHCOMBER MOTEL, INC.

By _____
SHIRLEY WOOLF, Secretary Petitioner

[fol. 3]

[fol. 9]

IN UNITED STATES DISTRICT COURT

MOTION FOR ADJUDICATION AND MOTION FOR A RECEIVER—
Filed September 12, 1958

Comes now your petitioner, Dade County Dairies, Inc., by and through its undersigned attorney and shows unto this Court as follows:

1. That it is a creditor of the above and foregoing Debtor in the amount of Seven Hundred Ninety-Six Dollars and Eighty-nine Cents ($796.89) for merchandise sold and delivered.

2. That it holds no security for its indebtedness, nor has it received any preferential payment.

3. That the premises of the Beachcomber Motel have now been closed, and no Plan of Arrangement can be effected, and that the assets of this estate are imperilled and the rights of the creditors of this estate in the said assets are in peril because of the lack of supervision and control by any court officer over the aforementioned Beachcomber Motel.

Wherefore, your petitioner prays as follows:

1. That this Court enter its Order adjudicating the Debtor a bankrupt.

[fol. 10] 2. That this Court enter its Order appointing a Receiver to take charge of the assets of this estate.

John H. Gunn, Attorney for Dade County Dairies, Inc., petitioner, 1205 Biscayne Building, Miami 32, Florida.

[File endorsement omitted]

Duly sworn to by John H. Gunn, jurat omitted in printing.

Certificate of Service (omitted in printing).

[fol. 11]

IN UNITED STATES DISTRICT COURT

ADJUDICATION OF BANKRUPTCY—September 17, 1958

At Miami, in said District, on the 17th day of September, 1958.

The petition of The Beachcomber Motel, Inc. filed on the 17th day of September, 1958, that it be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and there being no opposing interest;

It is adjudged that the said The Beachcomber Motel, Inc. is a bankrupt under the Act of Congress relating to bankruptcy.

L. Earl Curry, Referee in Bankruptcy.

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

PROOF OF CLAIM FOR INTERNAL REVENUE TAXES—
Filed April 11, 1963

IN THE MATTER OF:

• THE BEACHCOMBER MOTEL, INC.,
a Florida corporation,

Bankrupt.

DOCKET NO. 3988-M

TYPE OF PROCEEDING LIQUIDATING BANKRUPTCY
(Ori. Pet. filed in Arrangement, Ch. XI 8-6-58)

CLAIM OF THE UNITED STATES

FOR INTERNAL REVENUE TAXES

TO CONSOLIDATE AND SUPERSEDE ALL PRIOR PROOFS OF CLAIM AND ADMINISTRATIVE EXPENSE STATEMENT OF TAXES DUE.

The undersigned officer of the Internal Revenue Service, a duly authorized agent of the United States in this behalf, being duly sworn, deposes and says that:

1. The Beachcomber Motel, Inc., is justly and truly indebted to the United States in the sum of $3,037.35 with interest thereon as hereinafter stated;

2. The said debt is for taxes due under the internal revenue laws of the United States as follows:

KIND OF TAX AND PERIOD	REFERENCE NO.	AMOUNT DUE	REMARKS	DATE TAX LIEN AROSE
W-FICA, Qtr. 9/58	(59-4-14-Spl #11-02)	Bal. $ 60.04		4-14-59
Excise, Qtr. 9/58	(59-4-14-Spl #2-00)	644.00		4-14-59

FILED

CLAIM OF THE UNITED STATES

FOR INTERNAL REVENUE TAXES

Bankrupt.

TO CONSOLIDATE AND SUPERSEDE ALL PRIOR PROOFS OF CLAIM AND ADMINISTRATIVE EXPENSE STATEMENT OF TAXES DUE.

The undersigned officer of the Internal Revenue Service, a duly authorized agent of the United States in this behalf, being duly sworn, deposes and says that:

1. The Beachcomber Motel, Inc., is justly and truly indebted to the United States in the sum of $3,037.35 with interest thereon as hereinafter stated;

2. The said debt is for taxes due under the internal revenue laws of the United States as follows:

KIND OF TAX AND PERIOD	REFERENCE NO.	AMOUNT DUE	REMARKS	DATE TAX LIEN AROSE
W-FICA, Qtr. 9/58	(59-4-14-Spl #11-02)	Bal. $ 60.04		4-14-59
Excise, Qtr. 9/58	(59-4-14-Spl #2-00)	644.00		4-14-59
TOTAL PRE-PETITION TAXES.....		$704.04		
Administrative Expense Taxes:				
W-FICA, Qtr. A-9/58	(62-2-2-165018).....	519.89*		2--2-62
Assessed Penalty.....		129.97*		
Assessed Interest.....		101.54		
Accrued Interest to 4-10-63.....		46.34		
Excise, Qtr. 9/58	(59-4-14 Spl #2-00)..	644.00*		4-14-59
Assessed Penalty.....		161.00*		
Assessed Interest.....		17.58		
Accrued Interest to 4-10-63.....		192.35		
FUTA, 1958	(59-4-14-Spl #5-00)..	362.29*		4-14-59
Assessed Penalty.....		54.34*		
Assessed Interest.....		4.46		
Accrued Interest to 4-10-63.....		99.55		
TOTAL POST-PETITION TAXES..		$2,333.31		

GRAND TOTAL PRE-PSTITION AND POST PETITION TAXES $3,037.35

(FILE EXHIBIT OMITTED)

[fol. 13]

*Plus interest on this amount at 6% per annum or at the rate of $0.31 per day from 4/11/63 to date of payment.

3. No part of said debt has been paid and the same is now due and payable at the Office of the District Director of Internal Revenue;
4. There are no set-offs or counterclaims to said debt;
5. Except for the statutory tax liens which arose on the dates above stated, the United States does not hold, to the deponent's knowledge or belief, any security or securities for said debt;
6. No note or other negotiable instrument has been received for said debt or any part thereof, nor has any judgment been rendered with respect to said debt; and
7. Said debt has priority and must be paid in full in advance of distribution to creditors as and to the extent provided by law:

IN BANKRUPTCY ACT PROCEEDINGS see Sections 64, 77e, 199, 337(2), 455, and 659 of the Bankruptcy Act (11 U.S.C. 104, 205(e), 599, 737(2), 855, and 1059).

IN OTHER PROCEEDINGS see Section 3466 of the Revised Statutes (31 U.S.C. 191). Also, attention is invited to Section 3467 (31 U.S.C. 192) with respect to the personal liability of any executor, administrator, or other person who fails to pay the claims of the United States in accordance with their priority.

SUBSCRIBED AND SWORN TO BEFORE ME THIS

10th day of April 1963

Jurat omitted under Section 57a of the Bankruptcy Act as amended by Public Law 86-519 dated 6-12-60.

SIGNATURE Jack Durant

JACK DURANT

TITLE CHIEF, SPECIAL PROCEDURES SECTION

Office of the District Director of Internal Revenue

ADDRESS 400 West Ashley Street
P. O. Box 4249
Jacksonville, Florida

PART 1—FOR COURT (Or Fiduciary, if required by local procedures)

FORM 2317 (REV. 9-61)

3988 51

6

[fol. 13]

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

PROOF OF CLAIM FOR INTERNAL REVENUE TAXES—
Filed April 11, 1963

[fol. 15]

IN THE UNITED STATES DISTRICT COURT

TRUSTEE'S OBJECTIONS TO CLAIMS—
Filed September 24, 1963

Comes Now, John Nicholas, Trustee of the estate of the above styled Bankrupt, and files the following objections to claims filed herein:

1. Objection to claim #1 filed by Mr. Foster's Store in the amount of $206.73, which claimant claims priority, on the ground that there is no basis in law for according priority status to said claim.

2. Objection to claim #12 filed by Gerard B. Nolan in the amount of $500.00 for wages for the month of July 1958 on the ground that there is no proof in or annexed to said claim as to the alleged employment of the claimant, the dates and nature of the employment for which the claim is filed and accordingly no basis in law for according priority status to said claim.

3. Objection to claim #13 filed by Fines C. Nolan in the amount of $132.90 for alleged wages for the period from July 16th to August 1st, 1958, inasmuch as there is no proof in or annexed to said claim as to the alleged employment of the claimant, the dates and nature of employment for which the claim is filed and accordingly no basis in law for according priority status to said claim.

4. Objection to claim #22 filed by National Cash Register Company in the amount of $3,325.00 as an al-
[fol. 16] leged "secured" claim so as to deny priority status to said claim.

5. Objection to claim #29 filed by Airko Air Conditioning Co. in the amount of $1,012.51, which claimant claims priority status, said claim being for maintenance service, on the ground that there is no basis in law for according said claim priority status.

6. Objection to claim #38 filed by Mitchell S. Gordon in the amount of $70.00 as entertainer for which claim priority is claimed, on the ground that there is no basis in law for according said claim priority status.

7. Objection to claim #40 filed by Radio Corporation of America in the amount of $453.88 allegedly representing the unpaid balance under a retain title contract, so as to deny said claim "priority" status.

8. Objection to claim #51 filed by Internal Revenue Service in the amount of $3,037.35 so as to strike therefrom and reduce said claim by the amounts therein claimed and set forth as alleged penalties and post petition interest, and so as to limit the interest claimed thereunder to August 6th, 1958 the date of the filing of the Petition herein.

9. Objection is made to and motion is hereby made to strike claims #4, 42, 43 and 46 filed by Internal Revenue Service on the ground that claim #51 filed by Internal Revenue Service supersedes all prior claims filed by Internal Revenue Service.

John Nicholas, Trustee in Bankruptcy.

[fol. 17] John H. Gunn, Attorney for Trustee, 1534 Alfred I. duPont Building, Miami 32, Florida, By Irving M. Hartman.

[File endorsement omitted]

Duly sworn to by John Nicholas, jurat omitted in printing.

Certificate of Service (omitted in printing).

[fol. 19]

IN THE UNITED STATES DISTRICT COURT

ORDER ON TRUSTEE'S OBJECTIONS TO CLAIMS—
December 11, 1963

This Cause having come on before the Court on the Trustee's Objections to Claims filed herein, and after hearing Counsel for the Trustee, and Counsel for the Internal Revenue Service, and Mitchell S. Gordon, Claimant in person, and upon examination of the Claims filed herein, with such supporting documents as are annexed thereto, and the Court being otherwise fully advised in the premises, it is hereby,

Ordered:

1. That Claim No. 1 filed by Mr. Foster's Store in the amount of $206.73 be and the same is hereby allowed as an unsecured claim, without priority status.

2. That the Objection filed to Claim No. 12 be and the same is hereby disallowed, and said claim filed by Gerard B. Nolan in the amount of $500.00 for wages for the month of July, 1958, be and the same is hereby allowed as a priority claim, entitled to a second priority.

3. That the Objection filed to Claim No. 13 be, and the same is hereby disallowed and said claim filed by Fines [fol. 20] C. Nolan in the amount of $132.90 for wages for the period from July 16th to August 1, 1958, be and the same is hereby allowed as a priority claim, entitled to a second priority.

4. That the Objection filed to Claim No. 22 of National Cash Register Company in the amount of $3,325.00 as an alleged "Secured" and "Priority" claim be and the same is hereby sustained, and said claim be and the same is hereby allowed as an unsecured claim, without priority status.

5. That the Objection filed to Claim No. 29 filed by Airco Air Conditioning Co. in the amount of $1,012.51 as a Priority Claim be and the same is hereby sustained and said claim be and the same is hereby allowed as an unsecured claim, without priority status.

6. That the Objection filed to Claim No. 38 of Mitchell S. Gordon in the amount of $70.00 as an entertainer as an alleged wage claim be and the same is hereby sustained and said claim be and the same is hereby allowed as an unsecured claim, without priority status.

7. That the Objection filed to Claim No. 40 filed by Radio Corporation of America in the amount of $453.88 as an alleged priority claim be and the same is hereby sustained, and said claim be and the same is hereby allowed as an unsecured claim, without priority status.

8. That the Objection filed to Claim No. 51 of Internal Revenue Service in the amount of $3,037.35 be and the [fol. 21] same is hereby sustained, and the three items included therein entitled "Assessed Penalty" in the amounts of $129.97, $161.00 and $54.34, together with the three items entitled "Accrued Interest to 4/10/63" in the amounts of $46.34, $192.35, and $99.55, be and they are hereby disallowed and stricken from said claim, and said claim be and the same is hereby allowed to the following extent: (1) as an Administrative Tax Claim in the amount of $1,649.76 entitled to a first priority; and (2) as a Tax Claim in the amount of $683.55, entitled to a fourth priority.

9. That Claims No. 4, 42, 43 and 46 filed by Internal Revenue Service, having been consolidated into Claim No. 51, aforesaid, and being duplicated therein, be and the same are hereby disallowed and stricken.

Done and Ordered at Miami in said District, this 11 day of Dec., 1963.

J. B. Booher, Referee in Bankruptcy.

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

PETITION FOR REVIEW—Filed December 19, 1963

Comes now the United States of America, by and through its undersigned Attorney, and moves this Honorable Court [fol. 22] to review the Order of J. B. Booher, Referee in Bankruptcy, dated the 11th day of December 1963, disallowing certain portions of the Government's tax claims and determining the priority of other portions of said claims, and as reason therefor says that such determinations are contrary to law.

Dated at Miami, Florida, this 19th day of December 1963.

William A. Meadows, Jr., United States Attorney,
By: Lavinia L. Redd, Assistant United States Attorney.

[File endorsement omitted]

Certificate of Service (omitted in printing).

[fol. 24]

IN UNITED STATES DISTRICT COURT

CERTIFICATE OF REVIEW—Filed February 5, 1964

To the Honorable Judges of the Above Styled Court, Sitting in Review:

I, J. B. Booher, Referee in Bankruptcy herein, on the Petition of United States of America to review an Order made by me dated the 11th day of December, 1963, disallowing certain portions of the Government's tax claims, and determining the priority of other portions of said claims, hereby certify as follows:

1. Petition for an Arrangement under Chapter XI of the Acts of Congress relating to Bankruptcy filed on August 6, 1958, as Court File Paper 1.

2. Petition of Creditor for Order of Adjudication and appointment of Receiver filed September 12, 1958, as Court File Paper 13.

3. Order of Adjudication, filed on September 17, 1958, as Court File Paper 16.

4. Proofs of Claim filed by the United States of America on September 4, 1958, April 16, 1959, and June 15, 1959, as Claims number 4, 42, 43 and 46.

5. Proof of Claim and administrative expense statement filed by the United States of America consolidating and superseding all prior claims, filed on April 11, 1963, as Claim number 51.

6. Trustee's objections to claims, including motion to strike Claims 4, 42, 43 and 46 and objection to Claim No. [fol. 25] 51 filed by Internal Revenue Service, filed on September 24, 1963, as Court File Paper 188.

7. Order on Trustee's Objections to Claims filed on December 11, 1963, as Court File Paper 192.

8. Petition for Review of United States of America filed on December 19, 1963, as Court File Paper 193.

9. This Certificate on Petition for Review.

10. The questions presented are the alleged errors set forth in said Petition for Review dated the 19th day of December, 1963.

Dated February 5, 1964.

Respectfully submitted,

J. B. Booher, Referee in Bankruptcy.

[File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

ORDER AFFIRMING ORDER OF REFEREE—
April 6, 1964

This Cause came on to be heard on the Petition for Review filed herein by the United States of America, where- [fol. 26] in it sought to review an order entered by J. B. Booher, Referee in Bankruptcy, dated the 11th day of December, 1963, insofar as said order disallowed certain portions of the Government's tax claim and determined the priority of other portions of said claim, and on the Certificate of Review of said Referee dated the 5th day of February, 1964, filed herein by said Referee, and after hearing argument of counsel for the Trustee and of counsel for the United States of America, and the Court being otherwise fully advised, it is hereby

Ordered that the said Order entered herein on the 11th day of December, 1963, by Honorable J. B. Booher, Referee in Bankruptcy, be and the same is hereby affirmed.

Done and Ordered at the Courthouse in said District at Miami, Florida, this 6 day of April, 1964.

Emett C. Choate, United States District Judge.

Filed Miami, Florida, April 14, 1964. J. B. Booher, Referee in Bankruptcy.

[File endorsement omitted]

[fol. 27]

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed May 5, 1964

Comes now the United States of America and appeals the Order of the Court, affirming the Order of the Referee, dated April 6, 1964.

William A. Meadows, Jr., United States Attorney,
By: Lavinia L. Redd, Assistant United States Attorney.

[File endorsement omitted]

IN UNITED STATES DISTRICT COURT

TRUSTEE'S INTERIM REPORT—Filed July 5, 1961

To the Honorable J. B. Booher, Referee in Bankruptcy:

Comes now John Nicholas, Trustee herein, and respectfully shows unto this Court.

1. That he is the duly appointed and qualified Trustee herein.

[fol. 28] 2. That the following statement attached hereto, of his receipts and disbursements and his balance on hand, and the present status of the case, which he certified to be a true and correct accounting of his trust to date.

John Nicholas, Trustee.

State of Florida,
County of Dade, ss.

Before me the undersigned authority, personally appeared John Nicholas, who, being by me first duly sworn, deposes and says that he has read the above and foregoing report and that the facts therein are true and correct to the best of his knowledge and belief.

John Nicholas.

Sworn to and Subscribed before me this 5th day of July, 1961. Jeanette E. Tavormina, Notary Public, State of Florida at Large. My Commission Expires Jan. 5, 1963. Bonded by American Surety Co. of N. Y.

[File endorsement omitted]

Trustee's Interim Report, Beachcomber Motel, Inc., No. 3988-M.

RECEIPTS:		
Turnover—Settlement Bell Paper		$ 750.00
Turnover—Refund Horsley Millard Insurance Co.		1,018.48
[fol. 29]		
Judgment—Florida Power and Light		3,072.87
Suit—Settlement So. Bell Telephone		1,519.27
Turnover—Sale of inventory—18925 Collins Avenue Corp.		2,000.00
Turnover order—Mercantile National Bank		1,806.27
Settlement—Shirley Woolf		2,500.00
Total receipts		$ 12,666.89
DISBURSEMENTS:		
Court reporter	$ 735.10	
Photostats	25.76	
Filing fee—Clerk of USDC	58.90	
Abraham H. Shukat, attorneys fee—per C. O.	2,500.00	
Nathan Newman—Accountants fee per C. O.	450.00	
Appraisers	30.00	
Docket fee—Clerk of USCA	25.00	3,824.76
BALANCE ON HAND AS OF JULY 5, 1961		$ 8,842.13

NOTE:
Suit filed May 31, 1961, by creditors against the landlord of bankrupt to recover the security deposit under the bankrupts lease.

EXHIBIT A

[fol. 30]

IN UNITED STATES DISTRICT COURT

DESIGNATION OF RECORD FOR PRINTING—
Filed August 6, 1964

U. S. Court of Appeals, Edward W. Wadsworth, Clerk.

Comes now the United States of America, Appellant herein, and designates for printing the following portions of the Record on Appeal:

1. Petition for an Arrangement under Chapter XI of the Acts of Congress relating to Bankruptcy filed on August 6, 1958, (Court File Paper 1).

2. Petition of Creditor for Order of Adjudication and appointment of Receiver filed September 12, 1958, (Court File Paper 13).

3. Order of Adjudication, filed on September 17, 1958, (Court File Paper 16).

4. Proof of Claim and administrative expense statement filed by the United States of America consolidating and superseding all prior claims, filed on April 11, 1963, as Claim number 51.

5. Trustee's objections to claims, including motion to strike Claims 4, 42, 43 and 46 and objection to Claim No. [fol. 31] 51 filed by Internal Revenue Service, filed on September 24, 1963 (Court File Paper 188).

6. Order on Trustee's Objections to Claims filed on December 11, 1963, (Court File Paper 192).

7. Petition for Review of United States of America filed on December 19, 1963, (Court File Paper 193).

8. Certificate on Petition for Review filed February 5th, 1964.

9. Order Affirming Order of Referee, dated April 6, 1964.

10. Notice of Appeal filed May 5th, 1964.

11. Trustee's Interim Report, dated and filed July 5th, 1961 and Exhibit A thereof, (Court File Paper 163).

William A. Meadows, Jr., United States Attorney,
By: Lavinia L. Redd, Assistant U. S. Attorney.

Certificate of Service (omitted in printing).

[fol. 32]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21777

UNITED STATES OF AMERICA,

versus

JOHN NICHOLAS, Trustee of the Estate of Beachcomber Motel, Inc., Bankrupt.

ARGUMENT AND SUBMISSION—April 27, 1965

On this day this cause was called, and after argument by Karl Schmeidler, Esq., Atty., Dept. of Justice, for Appellant, and Robert E. Venney, Esq., for appellee, was submitted to the Court.

[fol. 33]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21777

UNITED STATES OF AMERICA, Appellant,

versus

JOHN NICHOLAS, Trustee of the Estate of Beachcomber Motel, Inc., Bankrupt, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

OPINION—May 25, 1965

Before TUTTLE, Chief Judge, RIVES and BELL, Circuit Judges.

TUTTLE, Chief Judge: On August 6, 1958, Beachcomber Motel, Inc., filed a petition for an arrangement proceeding under Chapter XI of the Bankruptcy Act. It was permitted to retain possession of the property as Debtor in Possession until, upon failure to submit an acceptable plan, [fol. 34] the company was adjudicated a bankrupt on September 17, 1958. During the intervening period of operation, the Debtor in Possession failed to make payment of certain taxes that accrued during this short period of operation. In fact, under the statute, the taxes that were collected or withheld for the quarter ending September 30, 1958, were not required to be included in returns to be filed until October 31, 1958. Others were to be returned by January 31, 1959. By this time, of course, the Trustee in Bankruptcy had succeeded to the duties of the former Debtor in Possession.

The Trustee failed to make the required returns and the Government filed an administrative expense statement

of the taxes due covering the following amounts: $519.89 of withholding and FICA taxes (Federal Insurance Contributions Act) accruing between August 6, 1958, when the petition for arrangement was filed and September 17, 1958, when the taxpayer was adjudicated a bankrupt; $644 of cabaret excise taxes also accruing between the same dates, and $362.29 of FUTA (Federal Unemployment Tax Act) accruing during 1958. The aggregate of these items is $1,526.18.

Additionally, the United States stated as administrative expense assessed interest on each of the three principal items above set forth in the amounts of $101.54, $17.58, and $4.46, respectively, totalling $123.58. These two sums, $1,526.18 principal amount of tax and assessed interest of $123.58, totalling $1,649.76, were allowed by the referee as an administrative tax claim entitled to first priority. [fol. 35] However, the referee sustained the trustee's objection to the Government's claim No. 51 as to the amounts set forth as alleged penalties and accrued interest. Thus, the referee disallowed the following amounts contained in the Government's administrative expense statement of taxes due; namely, assessed penalty on the withholding and FICA taxes in the amount of $129.97, on the excise taxes in the amount of $161, and on the FUTA in the amount of $54.34, aggregating $345.31. The referee also disallowed interest after the date of the assessment and accrued to April 10, 1963 (the day before the date of filing of Claim No. 51) on the withholding and FICA taxes in the sum of $46.34, on the amount of excise taxes in the sum of $192.35, and on the amount of FUTA taxes in the sum of $99.55, totalling $338.24. Claim No. 51 also sought interest on the amounts due at the rate of 31 cents per day from April 11, 1963, the date of the filing of the claim.

The referee, as already stated, allowed as an administrative expense entitled to a first priority the principal amounts of the taxes and assessed interest. Thus, the only controversy here is with respect to his disallowance

of the items of assessed penalties totalling $345.31 and interest accrued after the date of assessment, totalling $338.24, in all, $683.55 together with interest from April 11, 1963.

Upon a petition for review filed by the United States from the disallowance of these penalties and interest, the District Court affirmed the order of the referee.

As the Government points out, the distinction between taxes which accrue against a taxpayer prior to bankruptcy [fol. 36] and those which accrue against a trustee after bankruptcy, has become well settled. Pre-bankruptcy taxes are payable as tax claims against the bankrupt's estate under §57 of the Bankruptcy Act. 11 U.S.C.A. §93. They are entitled to payment as of the Fourth priority under §64a of the Act, 11 U.S.C.A. §104. If, however, a trustee becomes subject to taxes as a result of operations carried on after bankruptcy, these taxes constitute an expense of administration under §62a of the Act and, as such, are payable as a First priority under §64a.

The duty of the trustee in bankruptcy to pay taxes which accrue during the course of his administration, independent of tax claims which had accrued prior to bankruptcy, has long been recognized by the Supreme Court. See *Michigan* v. *Michigan Trust Co.*, 286 U.S. 334. Here, of course, the referee recognized this obligation, and properly required the payment of the principal amount of the taxes as an expense of administration. He drew the line, however, at the payment of interest on this principal amount of the taxes and additions to the tax, commonly called a penalty, arising from the failure of the trustee to make the necessary returns and payments on time.

The trustee here contends that since the taxes accrued while the Debtor in Possession was operating the corporation later to become bankrupt, rather than the trustee after bankruptcy, the taxes that accrued during this period should be treated as pre-bankruptcy taxes as should also, of course, the interest and penalties, if they are payable at all, when the failure to make the proper returns

[fol. 37] and payments is a failure of the bankruptcy trustee. As the Government points out, however, when a debtor is permitted to retain his possession under a Chapter XI arrangement proceeding, he is, within contemplation of the law, just like a trustee, certainly to the extent of his obligation and duty to do the things that the statute would require of a trustee in possession. In fact, where a plan for arrangement turns out to be unsuccessful and an adjudication of bankruptcy is entered, §3782 of the Act provides that "the proceedings shall be conducted, so far as possible, in the same manner and with like effect, as if a voluntary petition for adjudication in bankruptcy had been filed and a decree of adjudication had been entered on the day when the petition under this Chapter was filed; . . . " 11 U.S.C. §778. See *United States* v. *Sampsell,* 9 Cir., 193 F.2d 154. See also 8 Coll. on Bankruptcy (14 Ed. 1963 Rev.) Secs. 6.31 and 6.32 which states "the general purpose of §342 is that where a debtor continues in possession of his property, he shall be in fact a trustee. 'Its position as debtor, continued in possession, is for all practical purposes that of a trustee or receiver . . . ' 'A debtor continued in possession by court order is a court officer analogous to a receiver or trustee.' A debtor in possession 'has all the powers of an ordinary trustee . . . ' "

Thus, it is plain that the obligation of the trustee here was the same as if he had been in possession from the filing of the original Section XI proceedings. This being the case, it appears that the leading decision *Boteler* v. *Ingels,* 308 U.S. 57, answers the basic question whether the trustee is liable to the same obligation to make required [fol. 38] returns and payments upon penalty of suffering additions to the tax that a private tax-payer would face. We think it clear that he is so subject. The Supreme Court said in that case, "if businesses in California not conducted by a bankruptcy trustee are delinquent in the fees, they must pay the penalty. However, petitioners contention would exempt a trustee operating a business in bankruptcy

from this double-tax liability which other delinquents must bear. A state would thus be accorded the theoretical privilege of taxing businesses operated by trustees in bankruptcy on an equal footing with all other businesses, but would be denied the traditional and almost universal method of enforcing prompt payment." (p. 61)

We conclude that the principle announced in the *Boteler* case clearly applies here to the federal impositions. Thus, it follows that the referee and the trial court erred in not including the items listed above as costs and expenses of administration and thus payable under the First priority.

The judgment is Reversed and the case is Remanded for further proceedings not inconsistent with this opinion.

[fol. 39]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1964

No. 21777

D. C. Docket No. 3988-M-Bankruptcy U. S. Civil

UNITED STATES OF AMERICA, Appellant,

versus

JOHN NICHOLAS, Trustee of the Estate of Beachcomber Motel, Inc., Bankrupt, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Before TUTTLE, Chief Judge, RIVES and BELL, Circuit Judges.

JUDGMENT—May 25, 1965

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by Counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

Issued as Mandate: May 25, 1965.

[fol. 40]

[File endorsement omitted]

[fol. 42]

IN THE UNITED STATES COURT OF APPEALS

[Title omitted]

PETITION FOR REHEARING—Filed June 23, 1965

The Appellee, John Nicholas, Trustee of the Estate of Beachcomber Motel, Inc., Bankrupt, for petition for rehearing from the Opinion of the Court rendered May 25, 1965, in the above cause, says:

1. The Court has failed to recognize that the Internal Revenue Code requires tax returns to be made by those persons collecting and receiving revenue and the Court's Opinion is an extension of existing legislation to bankruptcy trustees and reaches a result neither contemplated nor intended by the Federal Internal Revenue Statutes (see accompanying Brief, Part 1).

[fol. 43] 2. This Court's ruling that federal tax statutes require bankruptcy trustees in liquidation to file tax returns for taxes were an obligation of a predecessor debtor in

possession, overlooked and failed to recognize the meaning and intent of the Statutes relating to the filing of tax returns (see accompanying Brief, Part 1).

3. The Court's Opinion requiring trustees to make returns for sums collected by others and to impose penalties and interest on a trustee in bankruptcy for his failure to file such returns violates the orderly procedure of administration prescribed by the Federal Bankruptcy Act (see accompanying Brief, Parts 1 and 3).

4. The Court failed to properly apply Section 378(2) of the Bankruptcy Act which relates to the time of accrual of rights of a trustee in bankruptcy in liquidation and was not intended to expand the duties of a liquidating trustee succeeding a debtor in possession (see accompanying Brief, Part 2).

5. This Court erred in its interpretation of Section 378(2) of the Bankruptcy Act in establishing a continuing identity for a liquidating trustee and his predecessor debtor in possession and overlooked the meaning and purpose of that Section which essentially is procedural and not substantive and furnishes no basis for imposition of duties on a trustee (see accompanying Brief, Part 2).

6. This Court in its ruling that a liquidating trustee in bankruptcy has the same obligation and duties as an operating debtor in possession overlooked and failed to consider the practical difficulties imposed by the Court's ruling on the trustee in a superseded Chapter XI proceeding.

[fol. 44] 7. This Court in its ruling that a trustee in a liquidating bankruptcy is required to pay tax prematurely, and not in the orderly manner contemplated by the Bankruptcy Act, places a trustee in a superseded Chapter XI proceeding in a unique position neither intended nor required by the applicable Federal Statutes (see accompanying Brief, Part 2).

8. The statement in the last paragraph on Page 4 of the Opinion of the Court dated May 25, 1965, to the effect that this Trustee contends that operating taxes of a debtor in possession should be treated as pre-bankruptcy taxes, is a misinterpretation of Appellee's position. This Petitioner categorically asserts that this is not and never was the position of appellee either in his Brief or argument of this cause. It has always been recognized that taxes incurred by a debtor in possession are entitled to priority under the first priority of Section 64 of the Bankruptcy Act as expenses of administration (note Trustee's Objections to Claim No. 8, Page 16, Record on Appeal).

9. This Court has not had an opportunity to consider the Opinion and reasoning of the United States Court of Appeals for the Eighth Circuit, in ***United States of America*** v. ***Jerome Kalishman, Trustee in Bankruptcy of Seymour Wallas and Company, Bankrupt,*** Cause No. 17,780 rendered June 4, 1965 (Appendix to accompanying Brief). The holding in the ***Kalishman*** case concerns the identical point raised in this Appeal but holds directly opposite to the decision which your Petitioner prays be reheard; and disallows the Government's claim for post-adjudication interest, recognizing that it disrupts the orderly administration of the Bankruptcy Act; is inequitable in result and is not supported by applicable legislation.

[fol. 45] Wherefore, Appellee prays that the Court withdraw and reconsider its Opinion of May 25, 1965, and on rehearing granted affirm the District Court.

John H. Gunn and Robert E. Venney, Attorneys for Appellee, 1534 Alfred I. duPont Building, Miami, Florida, By: Robert E. Venney.

CERTIFICATE OF SERVICE

It Is Hereby Certified that a true and correct copy of the foregoing Petition for Rehearing has been furnished by United States Mail, on this ..... day of June, 1965, to each of the following:

Louis F. Oberdorfer, Assistant Attorney General, Department of Justice, Washington, D. C. 20530.

William A. Meadows, Jr., United States Attorney, Federal Building, Miami, Florida.

Lavinia L. Redd, Assistant United States Attorney, Federal Building, Miami, Florida.

[fol. 76]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—July 9, 1965

Before TUTTLE, Chief Judge, RIVES and BELL, Circuit Judges.

Per Curiam:

It is Ordered that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby Denied.

[File endorsement omitted]

[fol. 77] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 78]

SUPREME COURT OF THE UNITED STATES

No. 650, October Term, 1965

JOHN NICHOLAS, Trustee of the Estate of Beachcomber Motel, Inc., Bankrupt, Petitioner,

v.

UNITED STATES.

ORDER ALLOWING CERTIORARI—January 17, 1966

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.